UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

BWXT-Pantex, LLC **Amarillo, Texas**

Employer

and **Case 16-RC-10636**

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

The Employer, BWXT-Pantex, LLC, is a Delaware corporation with an office and a place of business in Amarillo, Texas, engaged in the business of manufacturing, disassembling, and reconditioning nuclear weapons. The Petitioner, International Association of Machinists and Aerospace Workers, AFL-CIO, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of all employees classified as full-time and regular part-time patient care registered nurses at the Employer's plant located in Amarillo, Texas. A hearing officer of the Board held a hearing and the parties filed briefs with me. The parties have no local bargaining history.

I. ISSUE

The Unit sought by the Petitioner includes five full-time and regular part-time employees classified as Occupational Nurses, herein Nurses. The sole issue is whether these employees are "managerial employees" and therefore excluded from the protection of the Act.

For the reasons set forth below, I find that the employees in the petitioned-for unit are not managerial employees. Further, the employees in the petitioned-for unit share a sufficient community of interest to constitute an appropriate unit.

To lend context to my discussion of the issue, I will first provide an overview of the Employer's operations to the extent necessary for my discussion of the issue, followed by a statement of material facts and legal analysis. I will also discuss the exclusion of other nurses from the petitioned-for unit.

II. OVERVIEW OF EMPLOYER'S OPERATIONS

The BWXT-Pantex, LLC located in Amarillo, Texas employs approximately 3600 employees. The employees in the plant manufacture, disassemble, and recondition nuclear weapons.

The issue in this case involves Nurses employed in the Occupational Medicine Department (OMD), headed by Dr. A. Morton, Department Manager. The OMD adheres to the regulatory requirements set forth in 10 C.F.R. §§ 710-712, otherwise referred to as the Human Reliability Program (HRP). These regulations establish personnel security and safety standards in fields that involve working with nuclear explosives. The OMD exists to assist management in assuring that employees are "properly situated" in their occupation and not harmed in the course of executing the duties of the occupation. The OMD's mission includes preventative medicine and the treatment of illness and injury. The OMD is organizationally segmented into four separate functions—Administration and Support, Nursing Services, Psychology, and Clinical Services.

The employees in the petitioned-for unit constitute the Nursing Services function, supervised by B. Scott, Section Manager I, a nurse practitioner. Three other nurses work under

the Clinical Services Manager, C.C. Rowlett, a physician. N. Barr, Nurse Practitioner, and P. Allen, Nurse Practitioner, function as "Providers," and M. Gaines, the Sick Leave Administrator and registered nurse, supervises the Sick Leave Administration function within Clinical Services.

Twelve different international unions represent different segments of the employee population at the plant. These unions fall under the umbrella of the Metal Trades Council, which in turn answers to the Metal Trades Department, AFL-CIO in Washington, D.C.

III. FACTS

The record reflects that Nurses chiefly perform pre-placement, periodic, special, and return-to-work examinations. They spend most of their time assessing employees' fitness for duty through the administration of these tests. The fitness-for-duty evaluations are driven by the physical requirements of the position. The assessment process is keyed to the type of exam being administered. The Nurses spend relatively little time treating illnesses and injuries.

Pre-placement examinations require the Nurses to query the prospective employee regarding a self-administered medical history and perform ancilliary tests such as audiograms, electrocardiograms, pulmonary function tests, and tests that measure vital signs. This data is collected and used by a physician or nurse practitioner to determine the prospective employee's fitness for duty. Nurses are responsible for alerting the providers to any "problems" that they discover or suspect during the conduct of the initial evaluation.

Nurses also spend much of their time evaluating "return-to-work" employees who previously suffered an injury or illness that rendered them unable to perform their duties and responsibilities. In some cases, Nurses may return an employee to work without the immediate approval of a nurse practitioner or physician, but in all cases, the Nurse's work is subject to review by a physician or nurse practitioner. Likewise, Nurses do not have the discretion to refer

applicants and employees to physicians or clinicians other than those designated by the Employer.

In addition to the above-described responsibilities, the Nurses administer tests ordered by physicians. The record reflects that Nurses are subject to "Standing Orders," which authorize Nurses to administer routine tests, immunizations, and ordinary medications such as throat lozenges and Tylenol.

The record reflects that Nurses must conform to standard medical/nursing practices established within the profession, regulatory requirements and company policies. Nurses are not authorized to deviate from these standards, regulations and policies. The independent judgment they exercise falls within the scope of their responsibilities as defined by the Employer and accepted medical/nursing practices.

Although some Nurses are authorized to review incoming bills for their accuracy before they are forwarded to procurement and accounts payable for final action, Nurses do not otherwise have any authority to commit the Employer's funds or credit for internal or external services. The Department Manager holds the authority within the department for such activities.

The Nurses do not formulate the policies within Nursing Services. The record reflects that the Employer seeks input from the Nurses regarding how they conduct examinations and otherwise perform their duties and responsibilities. This information is considered in the development of policies, which may be reviewed by the Nurses before implementation. The Department Manager approves the final policies.

The clinic is open from 7:00 a.m. to 5:00 p.m. Within Nursing Services, Nurses may collectively decide which shifts they each prefer to work, subject to approval by the Nursing Services Section Manager, who is obligated to ensure that the clinic is fully staffed at all times. To that end, she may change schedules and reassign employees as she deems necessary.

The salary range for Nurses varies based on whether the employee is designated as Nurse I, Nurse II, or Nurse III. The nurses in the petitioned-for unit are designated as either Nurse II or Nurse III. The Nurse III classification includes the same duties and responsibilities as the Nurse II classification. In addition, the Nurse III classification may include other duties in addition to the duties performed by a Nurse II. The record evidence reflects that the increased levels are commensurate with expanded responsibilities. For instance, unlike Nurse IIs, Nurse IIIs perform employee job transfer evaluations, serve as team leader for emergency decontamination and patient triage, and provide support in planning and providing a continuing health education program. The record reflects that the salary range overlaps such that a Nurse II may be promoted to a Nurse III without an increase in salary.

IV. ANALYSIS

The Employer seeks to exclude the nurses in the petitioned-for unit on the basis that they are managerial employees. Although the Act contains no provision regarding "managerial employees," this category of employee has long been excluded from the protection of the Act. *See, e.g.*, ***Sutter Community Hospitals of Sacramento***, 227 NLRB 181, 193 (1976); ***Bell Aerospace***, 219 NLRB 384, 385 (on remand) (1975); ***General Dynamics Corp.***, 213 NLRB 851, 857 (1974).

Managerial employees . . . "formulate and effectuate management policies by expressing and making operative the decisions of their employer." ***NLRB v. Yeshiva University***, 444 U.S. 672, 682 (1980). Managerial employees exercise discretion within or independent of employer policy and are aligned with management. *Id*. At 683. Under Board policy, an employee may be excluded as a managerial employee only if (s)he . . . "represents management interests by taking

or recommending discretionary actions that effectively control or implement employer policy." *Id*.

An employee is not elevated to managerial status by exercising some judgment within parameters set by higher management. A final determination of whether an employee is managerial rests on the degree of discretion exercised by the employee. ***Bell Aerospace Co.***, 416 U.S. 267, 286 (1974).

Applying these rules to the case at hand, I find that the nurses in the petitioned-for unit are not managerial employees. Paramount to a finding that an employee is "managerial" is a high degree of discretion and authority exercised by the employee. The record in this case reflects that the Nurses operate within the confines of accepted medical and nursing standards, federal regulations, and employer policies. They administer routine tests and medications in accordance with the "Standing Orders" of the chief medical officer. They operate within established standards to identify "problems," which are communicated to the provider, who determines the appropriate responsive action and/or renders a final medical decision. In all instances, the work of Nurses is subject to review by a provider, and the Nurses work "under the direct supervision" of a provider. They do not have the authority to act outside of these parameters.

The Employer urges that because Nurses may return employees to work without the prior approval of a provider, they are managerial employees and should be excluded from an appropriate unit. The record reveals that in clear cases, Nurses may return employees to duty pending the provider's final review and determination, which is essentially a paper exercise. These routine, limited discretionary decisions do not rise to the level of authority and discretion which would exclude them from the protection of the Act.

The record reveals that although Nurses provide input into the policy-making process, their contribution may not be characterized as "formulating" policy. Nurses likewise do not have any authority to commit the Employer's funds or credit. They do not determine clinic hours or employee schedules—Nurses may be scheduled according to business needs at the direction of the Nursing Services Section Manager.

In its post hearing brief, the Employer argues that the application of ***NLRB v. Yeshiva University*** to the facts in this case support a finding that the Nurses are "managerial employees" because the Nurses "effectively recommend" fitness-for-duty determinations. ***NLRB v. Yeshiva University***, 444 U.S. 672, 683 fn. 6 (1980). Although the Employer properly relies on the rule set forth in ***Yeshiva***, its analysis falls short in its factual comparison to the case here. In ***Yeshiva***, the Supreme Court articulated the "controlling consideration" of the case:

> [T]he faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial. Their authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained and graduated. *Id*. at 686.

The record in the present case simply does not reflect that the Nurses carry similar responsibilities or authority. Their authority with regard to medical decisions is clearly not absolute, but is instead subject to final review and/or determination by a provider *in all cases*, even though in clear cases they may return an employee to duty pending a final paper review. They do not determine the physical requirements for the positions or the tests to be administered in each type of fitness-for-duty case. They perform their work in accordance with accepted medical and nursing standards, federal regulations, and Employer policy. Finally, the Nurses do not formulate policy—the record reflects their role in policy-making as mere "input."

The Employer also argues that the loyalty of the Nurses at issue is compromised when they are placed in roles where they must determine the fitness for duty of employees in the bargaining unit, and cites ***Yeshiva*** as support. As the Petitioner correctly notes, ***Yeshiva*** does not militate a finding that the Nurses in this case, whose activities fall within "the scope of duties routinely performed by similarly situated professionals," are "aligned with management" to a degree that requires their exclusion from the protection of the Act as managerial employees. ***NLRB v. Yeshiva University***, 444 U.S. 672, 690 (1980).

Attached to the Employer's brief is an exhibit published by the American Association of Occupational Health Nurses (AAOHN), a professional association. The Employer also included excerpts from this document in its brief. The document and excerpts purport to support the Employer's chief argument—that the Nurses formulate and effectuate the Employer's fitness-for-duty policies and procedures. I have taken judicial notice of this evidence pursuant to Fed.R.Evid. 201. I find that the AAOHN's "Occupational and Environmental Health Nursing Fact Sheet" merely highlights advantages to this niche within the nursing profession. This evidence does not militate a finding that the Nurses in the case at hand are managerial employees.

Based on the forgoing, I find that Nurses do not exercise independent judgment and discretion and are not aligned with management in a manner that would render them managerial employees. Further, the parties do not dispute, and the record supports, that the petitioned-for bargaining unit is an appropriate unit of nurses. The Nurses share a sufficient community of interest because they are paid within a specific salary range set for Nurses; work the same hours; are required to possess the same qualifications, training and skills; share common supervision; are functionally aligned under Nursing Services; and regularly interact with each other in the

performance of their duties and responsibilities. ***Kalamazoo Paper Box Corp.***, 136 NLRB 134, 137 (1962). Therefore, a unit of Nurses constitutes an appropriate unit.

V. OTHER CLASSIFICATIONS

At the outset of the hearing, the parties agreed that four nurses other than the nurses in the petitioned-for unit should be excluded based on either their supervisory or managerial responsibilities—the Section Manager, Nursing Services (Nurse Practitioner); the Sick Leave Administrator (Registered Nurse); and two providers (Nurse Practitioners).

The Employer asserts that the Section Manager, Nursing Services and the Sick Leave Administrator are both supervisors. The Petitioner did not dispute the assertion; however the record does not support the conclusion. The party asserting supervisory status bears the burden of proof. ***Kentucky River Community Care, Inc.***, 532 U.S. 706, 712 (2001). In this case, the Employer failed to present evidence sufficient to support a finding that either of the aforementioned nurses are supervisors.

Similarly, the Employer did not present record evidence to demonstrate that the four nurses other than the nurses in the petitioned-for unit represent management interests by taking or recommending discretionary actions that effectively control or implement employer policy. ***NLRB v. Yeshiva University***, 444 U.S. 672, 683 (1980). Nevertheless, the parties do not dispute the exclusion of these nurses. In fact, the record reflects that they do not share a community of interest with the nurses in the petitioned-for unit.

The record reflects that the Sick Leave Administrator performs a role distinct from that of a Nurse. She is a "utilization review nurse" with special training in case management and providing after care to persons recovering from illness. She is responsible for administering the sick leave program and coordinating the return-to-work process. The Sick Leave Administrator

does not share common supervision with Nurses, requires different skills than Nurses, performs a unique job function, and is functionally aligned under Clinical Services. Based on these facts, the Sick Leave Administrator does not share a community of interest that would mandate her inclusion in the petitioned-for unit.

Two provider Nurse Practitioners, like the Sick Leave Administrator, report to the Clinical Services Manger. A nurse practitioner also occupies the position of Section Manager, Nursing Services. Nurse Practitioners exercise a greater level of authority due to their education, credentials and privileges, and accordingly constitute an entirely separate classification of nurses. Nurse Practitioners review the work of the Nurses and have the authority to render some final medical decisions and prescribe medication without further approval by a physician. Based on these facts, the Nurse Practitioners do not share a community of interest that would mandate their inclusion in the petitioned-for unit.

VI. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The parties stipulated and I find that the Employer, BWXT-Pantex, LLC, a Delaware corporation with an office and a place of business in Amarillo, Texas, is engaged in the business of manufacturing, disassembling, and reconditioning nuclear weapons. During the past 12 months, the Employer has sold and shipped goods valued in excess of $50,000 directly to points outside the State of Texas. Based on the foregoing, I find the Employer is engaged in commerce within the

meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Petitioner claims to represent certain employees of the Employer.

4. The parties stipulated to the petitioner's status as a labor organization.

5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

6. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

INCLUDED: All full-time and regular part time Occupational Nurses at the Employer's plant located in Amarillo, Texas.
EXCLUDED: Office clerical, professional employees, managerial employees, guards, and supervisors as defined in the Act.

VII. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by the International Association of Machinists and Aerospace Workers, AFL-CIO.

The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who

have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. ***Excelsior Underwear, Inc.***, 156 NLRB 1236 (1966); ***NLRB v. Wyman-Gordon Company***, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. ***North Macon Health Care Facility***, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Fort Worth Regional Office, Federal Office Building, Room 8A24, 819 Taylor Street, Fort Worth, Texas 76102 on or before March 3, 2005. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at 817-978-2928. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. ***Club Demonstration Services***, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

VIII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5:00 p.m., EST on March 10, 2005. The

request may **not** be filed by facsimile.

/s/ Curtis A. Wells

Dated: February 24, 2005

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